UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

CROSVYN RIVERA AMADOR, Plaintiff	§ § §	
v.	§	Civil Action No. 7:16-cv-00595
	§	
UNITED STATES OF AMERICA, Defendant.	§ §	

JOINT DISCOVERY/CASE MANAGEMENT PLAN
UNDER RULE 26(f)
FEDERAL RULES OF CIVIL PROCEDURE

1. State where and when the meeting of the parties required by Rule 26(f) was held, and identify the counsel who attended for each party.

Counsel for the parties, Tamara L. Jezic for the Plaintiff, and Christopher D. Pineda for Defendant, conducted the meeting via phone and email on November 22 and 28, 2016.

2. List the cases related to this one that are pending in any state or federal court with the case number and court.

The following cases were recently transferred to the Southern District of Texas from the Eastern District of Virginia and involve similar or identical allegations and claims brought by the same counsel against the United States:

- *Morales-Aguilar v. United States* (Civil No. 1:16-cv-048) (Olvera, J.) transferred on February 26, 2016. Magistrate Judge Torteya recently issued his Report and Recommendation to which the parties filed objections on November 17, 2016.

- *Hernandez-Najera v. United States* (Civil No. 1:16-cv-303) (Hanen, J.) transferred on November 23, 2016.

The following case recently was transferred to the Southern District of Texas from the District of Maryland and involves similar allegations and claims. Counsel for Plaintiff has moved to appear *pro hac vice* on behalf of the plaintiff in this claim against the United States:

- *Carcamo-Villafuerte v. United States* (Civil No. 7:16-cv-619) (Crane, J.) transferred on October 24, 2016.

3 Briefly describe what this case is about:

Plaintiff: This is a suit for damages under the Federal Tort Claims Act ("FTCA") resulting from torts committed by law enforcement officers employed by the United States Customs and Border Protection ("CBP"). Plaintiff seeks damages under the FTCA for mental and physical pain and injury he sustained as a result of his detention in CBP holding facilities located in CBP's Rio Grande Valley Sector from about August 29, 2013 to September 1, 2013. Plaintiff was detained in CBP holding cells known as "*hieleras*," the Spanish word for "freezers" or "ice boxes," because the temperatures in the holding cells are kept at extremely low levels. CBP operates these holding facilities in a manner its agents know or should know puts the detainees at an unreasonable risk of psychological and physical injury and harm. Plaintiff asserts three causes of action: negligence, intentional infliction of emotional distress ("IIED"), and assault and battery.

4. Specify the allegation of federal jurisdiction.

Plaintiff: Plaintiff brings this action under the FTCA, 28 U.S.C. § 1271 *et. seq.* This Court has jurisdiction under 28 U.S.C. §§ 1331 and 1346(b).

5. Name the parties who disagree and the reasons.

Defendant: This case arises from Plaintiff's complaints about detention conditions while in U.S. Customs and Border Protection holding cells over a period of three to four days in 2013, which he asserts gave rise to three causes of action: negligence, intentional infliction of emotional distress ("IIED"), and assault and battery. Defendant contends that to the extent Plaintiff's factual allegations—and particularly those in support of his IIED claim—demonstrate that he is actually asserting a constitutional "conditions of confinement" claim, the Federal Tort Claims Act does not waive the United States' sovereign immunity and thus this Court lacks subject matter jurisdiction.

Plaintiff initially filed this suit in the Eastern District of Virginia, Alexandria Division ("EDVA"). The United States filed a motion to transfer and motion to dismiss on September 19, 2016. Dkt. No. 8. The EDVA district court issued an order on October 12, 2016, transferring this case to the Southern District of Texas, McAllen Division based upon the agreement of the parties, the convenience of the parties and witnesses, and in the interests of justice. Dkt. No. 12. Rivera filed a notice on November 10, 2016 indicating that he did not believe Defendant's motion to dismiss was currently pending given that the "dismissal" relief that Defendant requested was sought in the alternative to the motion to transfer venue. Dkt. No. 18. Defendant, accordingly, will re-file its motion to dismiss this week out of an abundance of caution to replace its motion to dismiss filed September 19, 2016.

6. List anticipated additional parties that should be included, when they can be added, and by whom they are wanted.

None.

7. List anticipated interventions.

None.

8. Describe class-action issues.

None.

9. State whether each party represents that it has made the initial disclosures required by Rule 26(a). If not, describe the arrangements that have been made to complete the disclosures.

Plaintiff: Plaintiff respectfully requests that the Court stay discovery and the issuance of a scheduling order until the Court rules on Defendant's motion to dismiss. Alternatively, the plaintiff proposes the parties make initial disclosures by January 6, 2017.

Defendant: Initial disclosures have not been made, pending the Court's ruling on Defendant's motion to dismiss, which will be filed this week.

10. Describe the proposed agreed discovery plan, including:

A. Responses to all the matters raised in Rule 26(f).

26(f)(3)(A): What changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

Plaintiff: Plaintiff respectfully requests that the Court stay discovery and the issuance of a scheduling order until the Court rules on Defendant's motion to dismiss. Alternatively, the plaintiff proposes the parties make initial disclosures by January 7, 2017.

Defendant: Defendant contends this Court lacks subject matter jurisdiction over Plaintiff's causes of action, and/or that Plaintiff failed to state a claim upon which relief can be granted. Defendant will re-file its motion to dismiss this week to replace the motion to dismiss filed on September 19, 2016 when this action was previously in the Eastern District of Virginia. Defendant asserts that discovery will not be necessary to rule on Defendant's motion to dismiss. Defendant respectfully requests that the Court stay the issuance of a scheduling order (and stay all discovery) until such time that the Court has ruled on Defendant's motion to dismiss.

26(f)(3)(B): The subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

Plaintiff: Plaintiff respectfully requests that the Court stay discovery and the issuance of a scheduling order until the Court rules on Defendant's motion to dismiss.

Discovery will be needed concerning topics including but not limited to temperature regulation in the Customs and Border Protection (CBP) holding cells where Plaintiff was detained; intake and processing of the plaintiff; provision of food and water to detainees during the plaintiff's detention; provision of blankets and bedding during the plaintiff's detention; provision of hygiene items during the Plaintiff's detention; holding cell size and capacity; identity of CBP officials involved in Plaintiff's detention; intent of the CBP officials in exposing the plaintiff to the conditions of detention alleged in the plaintiff's Complaint; documents maintained by CBP concerning the plaintiff; and other issues. Plaintiff proposes that the parties exchange written discovery requests and responses, and then coordinate depositions of witnesses located in the Southern District of Texas. Plaintiff requests access to the holding cells where the plaintiff was detained in order to photograph and take video of the areas.

Defendant: Defendant contends this Court lacks subject matter jurisdiction over Plaintiff's causes of action, and/or that Plaintiff failed to state a claim upon which relief can be granted. Defendant will re-file its motion to dismiss this week to replace the motion to dismiss filed on September 19, 2016 when this action was previously in the Eastern District of Virginia. Defendant asserts that discovery will not be necessary to rule on Defendant's motion to dismiss. Defendant respectfully requests that the Court stay the issuance of a scheduling order (and stay all discovery) until such time that the Court has ruled on Defendant's motion to dismiss.

26(f)(3)(C): Any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

Plaintiff: Plaintiff respectfully requests that the Court stay discovery and the issuance of a scheduling order until the Court rules on Defendant's motion to dismiss.

Electronically stored information should be produced in accordance with the Federal Rules. The plaintiff will accept electronically stored information responsive to discovery requests in electronic or paper form.

Defendant: Defendant contends this Court lacks subject matter jurisdiction over Plaintiff's causes of action, and/or that Plaintiff failed to state a claim upon which relief can be granted. Defendant will re-file its motion to dismiss this week to replace the motion to dismiss filed on September 19, 2016 when this action was previously in the Eastern District of Virginia. Defendant asserts that discovery will not be necessary to rule on Defendant's motion to dismiss. Defendant respectfully requests that the Court stay the issuance of a scheduling order (and stay all discovery) until such time that the Court has ruled on Defendant's motion to dismiss.

26(f)(3)(D): Any issues about claims of privilege or of protection as trial-preparation materials, including-if the parties agree on a procedure to assert

these claims after production-whether to ask the court to include their agreement in an order;

Plaintiff: Plaintiff respectfully requests that the Court stay discovery and the issuance of a scheduling order until the Court rules on Defendant's motion to dismiss.

Claims of privilege or protection should be made pursuant to FRCP 26.

Defendant: Defendant contends this Court lacks subject matter jurisdiction over Plaintiff's causes of action, and/or that Plaintiff failed to state a claim upon which relief can be granted. Defendant will re-file its motion to dismiss this week to replace the motion to dismiss filed on September 19, 2016 when this action was previously in the Eastern District of Virginia. Defendant asserts that discovery will not be necessary to rule on Defendant's motion to dismiss. Defendant respectfully requests that the Court stay the issuance of a scheduling order (and stay all discovery) until such time that the Court has ruled on Defendant's motion to dismiss.

26(f)(3)(E): What changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed;

Plaintiff: None at this time.

Defendant: Defendant contends this Court lacks subject matter jurisdiction over Plaintiff's causes of action, and/or that Plaintiff failed to state a claim upon which relief can be granted. Defendant will re-file its motion to dismiss this week to replace the motion to dismiss filed on September 19, 2016 when this action was previously in the Eastern District of Virginia. Defendant asserts that discovery will not be necessary to rule on Defendant's motion to dismiss. Defendant respectfully requests that the Court stay the issuance of a scheduling order (and stay all discovery) until such time that the Court has ruled on Defendant's motion to dismiss.

26(f)(3)(F): Any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

Plaintiff: None at this time.

Defendant: Defendant contends this Court lacks subject matter jurisdiction over Plaintiff's causes of action, and/or that Plaintiff failed to state a claim upon which relief can be granted. Defendant will re-file its motion to dismiss this week to replace the motion to dismiss filed on September 19, 2016 when this action was previously in the Eastern District of Virginia. Defendant asserts that discovery will not be necessary to rule on Defendant's motion to dismiss. Defendant respectfully requests that the Court stay the issuance of a scheduling order (and stay all discovery) until such time that the Court has ruled on Defendant's motion to dismiss.

B. When and to whom the plaintiff anticipates it may send interrogatories.

Plaintiff: Plaintiff respectfully requests that the Court stay discovery and the issuance of a scheduling order until the Court rules on Defendant's motion to dismiss.

Alternatively, Plaintiff proposes sending interrogatories to Defendant by January 6, 2017.

C. When and to whom the defendant anticipates it may send interrogatories.

Defendant: Defendant contends this Court lacks subject matter jurisdiction over Plaintiff's causes of action, and/or that Plaintiff failed to state a claim upon which relief can be granted. Defendant will re-file its motion to dismiss this week to replace the motion to dismiss filed on September 19, 2016 when this action was previously in the Eastern District of Virginia. Defendant asserts that discovery will not be necessary to rule on Defendant's motion to dismiss. Defendant respectfully requests that the Court stay the issuance of a scheduling order (and stay all discovery) until such time that the Court has ruled on Defendant's motion to dismiss.

D. Of whom and by when the plaintiff anticipates taking oral depositions.

Plaintiff: Plaintiff respectfully requests that the Court stay discovery and the issuance of a scheduling order until the Court rules on Defendant's motion to dismiss.

The plaintiff will identify the witnesses she seeks to depose after the defendant has completely answered the plaintiff's written discovery requests.

E. Of whom and by when the defendant anticipates taking oral depositions.

Defendant: Defendant contends this Court lacks subject matter jurisdiction over Plaintiff's causes of action, and/or that Plaintiff failed to state a claim upon which relief can be granted. Defendant will re-file its motion to dismiss this week to replace the motion to dismiss filed on September 19, 2016 when this action was previously in the Eastern District of Virginia. Defendant asserts that discovery will not be necessary to rule on Defendant's motion to dismiss. Defendant respectfully requests that the Court stay the issuance of a scheduling order (and stay all discovery) until such time that the Court has ruled on Defendant's motion to dismiss.

F. When the plaintiff (or the party with the burden of proof on an issue) will be able to designate experts and provide the reports required by Rule 26(a)(2)(B), and when the opposing party will be able to designate responsive experts and provide their reports.

Plaintiff: Plaintiff respectfully requests that the Court stay discovery and the issuance of a scheduling order until the Court rules on Defendant's motion to dismiss.

Defendant: Defendant contends this Court lacks subject matter jurisdiction over Plaintiff's causes of action, and/or that Plaintiff failed to state a claim upon which relief can be granted. Defendant will re-file its motion to dismiss this week to replace the motion to dismiss filed on September 19, 2016 when this action was previously in the Eastern District of Virginia. Defendant asserts that discovery will not be necessary to rule on Defendant's motion to dismiss. Defendant respectfully requests that the Court stay the issuance of a scheduling order (and stay all discovery) until such time that the Court has ruled on Defendant's motion to dismiss.

G. List expert depositions the plaintiff (or the party with the burden of proof on an issue) anticipates taking and their anticipated completion date. See Rule 26(a)(2)(B) (expert report).

Plaintiff: Plaintiff respectfully requests that the Court stay discovery and the issuance of a scheduling order until the Court rules on Defendant's motion to dismiss.

The plaintiff anticipates deposing any and all experts designated by the defendant. Plaintiff proposes taking the depositions of the defendant's experts within six weeks of the defendant's expert designation.

H. List expert depositions the opposing party anticipates taking and their anticipated completion date. See Rule 26(a)(2)(B) (expert report).

Defendant: Defendant contends this Court lacks subject matter jurisdiction over Plaintiff's causes of action, and/or that Plaintiff failed to state a claim upon which relief can be granted. Defendant will re-file its motion to dismiss this week to replace the motion to dismiss filed on September 19, 2016 when this action was previously in the Eastern District of Virginia. Defendant asserts that discovery will not be necessary to rule on Defendant's motion to dismiss. Defendant respectfully requests that the Court stay the issuance of a scheduling order (and stay all discovery) until such time that the Court has ruled on Defendant's motion to dismiss.

11. If the parties are not agreed on a part of the discovery plan, describe the separate views and proposals of each party.

The parties respectfully request the Court stay discovery and the issuance of a scheduling order until the Court rules on Defendant's motion to dismiss.

12. Specify the discovery beyond initial disclosures that has been undertaken to date.

None.

13. State the date the planned discovery can reasonably be completed.

Plaintiff: Plaintiff respectfully requests that the Court stay discovery and the issuance of a scheduling order until the Court rules on Defendant's motion to dismiss. Plaintiff proposes that discovery be closed 60 days after the defendant designates its experts.

Defendant: Defendant contends this Court lacks subject matter jurisdiction over Plaintiff's causes of action, and/or that Plaintiff failed to state a claim upon which relief can be granted. Defendant will re-file its motion to dismiss this week to replace the motion to dismiss filed on September 19, 2016 when this action was previously in the Eastern District of Virginia. Defendant asserts that discovery will not be necessary to rule on Defendant's motion to dismiss. Defendant respectfully requests that the Court stay the issuance of a scheduling order (and stay all discovery) until such time that the Court has ruled on Defendant's motion to dismiss.

14. Describe the possibilities for a prompt settlement or resolution of the case that were discussed in your Rule 26(f) meeting.

Plaintiff: The parties cannot resolve this matter at this time because Defendant maintains that the Court should dismiss Plaintiff's case.

Defendant: The parties cannot resolve the matter at this time because this Court lacks subject matter jurisdiction over Plaintiff's causes of action, and/or Plaintiff failed to state a claim upon which relief can be granted.

15. Describe what each party has done or agreed to do to bring about a prompt resolution.

Plaintiff: The plaintiff is willing to participate in alternative dispute resolution, once the Court rules on Defendant's motion to dismiss.

Defendant: A prompt resolution is not possible at this time because this Court lacks subject matter jurisdiction over Plaintiff's causes of action, and/or Plaintiff failed to state a claim upon which relief can be granted.

16. From the attorneys' discussion with the client, state the alternative dispute resolution techniques that are reasonably suitable, and state when such a technique may be effectively used in this case.

Plaintiff: The plaintiff is willing to participate in mediation, after the Court rules on Defendant's motion to dismiss and after discovery.

Defendant: Alternative dispute resolution techniques are premature at this time given that the Court lacks subject matter jurisdiction over Plaintiff's causes of action, and/or Plaintiff failed to state a claim upon which relief can be granted.

17. Magistrate judges may now hear jury and non-jury trials. Indicate the parties' joint position on a trial before a magistrate judge.

The parties could not agree whether this case should be tried before a magistrate judge.

18. State whether a jury demand has been made and if it was made on time.

Not applicable; this is a Federal Tort Claims Act case.

19. Specify the number of hours it will take to present the evidence in this case.

Plaintiff: Plaintiff requests a two-day trial.

Defendant: Defendant is unable to predict how long a trial will take at this time.

20. List pending motions that could be ruled on at the initial pretrial and scheduling conference.

Plaintiff's motion to appear telephonically at initial pretrial and scheduling conference is currently pending. (Dkt. No. 19). Defendant is unopposed.

21. List other motions pending.

Defendant will, out of an abundance of caution, re-file its motion to dismiss this week. As noted, Defendant filed a motion to transfer venue and motion to dismiss on September 19, 2016 when this action was previously in the Eastern District of Virginia (Dkt. No. 8). The EDVA district court granted the motion to transfer venue on October 12, 2016, based upon the agreement of the parties, the convenience of the parties and witnesses, and the interests of justice, but the Court did not rule on Defendant's motion to dismiss.

22. Indicate other matters peculiar to this case, including discovery, that deserve the special attention of the court at the conference.

The parties respectfully request that issuance of a scheduling order, and all discovery, be stayed until such time that the Court has ruled on Defendant's motion to dismiss.

23. Certify that all parties have filed Disclosure of Interested Parties as directed in the Order for Conference and Disclosure of Interested Parties, listing the date of filing for original and any amendments.

Defendant filed its Certificate of Interested Parties on November 28, 2016. Plaintiff filed his Certificate of Interested Parties on November 28, 2016.

24. List the names, bar numbers, addresses and telephone numbers of all counsel.

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Respectfully submitted,

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By: ***s/ Christopher D. Pineda***

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CERTIFICATE OF SERVICE

I, Christopher D. Pineda, do hereby certify that on November 28, 2016, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following counsel of record:

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